Supreme Court, U.S.
FILED

941699 APR 10 1995

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DIANE ALADDIN, *et al.*,

Petitioners,

v.

GRUMMAN AMERICAN AVIATION CORPORATION, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court of appeals may rubberstamp a district court's evidentiary rulings in the guise of applying an abuse of discretion standard, where the record on appeal conclusively established, ten pages into the transcript of trial testimony, the entry of a blanket preclusion order by the trial court.

2. Whether, as a matter of federal evidence law, a more relaxed standard of substantial similarity is implicated where other accidents are offered to show notice of a defect or dangerous condition, than when other accidents evidence is offered as direct proof of defect or causation.

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Third Circuit: Diane Aladdin, a Pennsylvania citizen, individually and as administratrix of the estate of Ziad Aladdin, and Donna Dunlap, a Pennsylvania citizen, individually and as executrix of the estate of Carl Dunlap (appellants); Grumman American Aviation and Grumman Aerospace Corporation, which purchased certain aviation assets from Grumman American Aviation (appellees).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The final order of the United States Court of Appeals for the Third Circuit, on petition for rehearing, appears in the appendix to this petition, as well as the judgment order of the Court of Appeals (per Jane R. Roth, C.J.). Also appearing in the appendix is the opinion and order of the United States District Court for the Eastern District of Pennsylvania (Har-

vey Bartle III, D.J.), denying petitioners' motion for judgment as a matter of law or, in the alternative, for a new trial.

JURISDICTION

On January 9, 1995, the United States Court of Appeals for the Third Circuit denied petitioners' petition for rehearing of its December 9, 1994 judgment. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

The rules involved in this case, Rules 403 and 404 of the Federal Rules of Evidence, appear in the appendix to this petition.

STATEMENT OF THE CASE

This civil action arises out of the fatal crash of a Grumman AA-1B flight training aircraft on July 29, 1990 in Springfield, New Jersey, which took the lives of Carl Dunlap, a flight instructor, and Ziad Aladdin, a student pilot. Wrongful death and survival actions were brought on behalf of the estates and statutory heirs of these two gentlemen, which were tried before a jury in November of 1993.

Plaintiffs, the widows and personal representatives of the estates of the flight instructor and student pilot, filed suit against the manufacturer of the AA-1B aircraft, Grumman American Aviation Corporation, and its successor in interest, Gulfstream Aerospace Corporation (hereinafter "Grumman"). (J.A. at 14-23). The Grumman defendants filed a third-party complaint for contribution against Hortman Aviation, Inc., the owner of the accident aircraft and the operator of the flight school which employed Mr. Dunlap. (J.A. at 29-52).

Plaintiffs proceeded to trial on theories of strict liability and negligence, and offered testimony that the accident was a "stall/spin" accident which occurred when the student and instructor were practicing emergency landings. (N.T. Nov. 3, 1993 at 41, 71) (J.A. at 784, 814). Plaintiffs offered engineering and piloting testimony that the AA-1B aircraft was unsuit-

able as a primary trainer because of its aerodynamic characteristics, which made it unforgiving and unsuitable for teaching students how to fly, and that the airplane had insufficient stall warnings to be used as a primary trainer. (N.T. Nov. 3, 1993 at 115-117; N.T. Nov. 4, 1993 at 17, 127) (J.A. at 858-60, 1027, 1137). Grumman presented testimony that the AA-lB aircraft was suitable as a primary training airplane, that there was no problem with the stability or maneuverability, that in fact the aircraft was "quite docile", and that the Federal Aviation Administration ("FAA") had conducted flight tests which indicated that there was nothing about the aircraft which was unsuitable. (N.T. Nov. 8, 1993 at 178, 226-228) (J.A. at 1614, 1662-64).

Grumman moved *in limine* to preclude any reference to other accidents absent a showing of substantial similarity. Prior to trial and without reviewing any of the documentary evidence or hearing any testimony, the trial judge precluded plaintiffs from making reference to other AA-1 accidents, cautioning counsel on the first day of trial that he was "not to mention any other accidents. I've ruled on that." (N.T. Nov. 3, 1993 at 10) (J.A. at 753). The excluded evidence fell into two general categories: (1) the testimony of Michael N. Antoniou, an engineering test pilot involved in the certification process, who had personal knowledge of fifteen accidents; and (2) correspondence by and between Grumman and the FAA concerning a certification review prompted by a number of accidents in the trainer, as well as the flight test evaluation reports issued by the FAA after that review.

As for the fifteen accidents of which Mr. Antoniou had personal knowledge, the trial judge declined to allow plaintiffs to even lay a foundation before excluding them. The following colloquy took place at sidebar:

> MR. WOLK: One of the areas I wanted to get into with Mr. Antoniou was the fact that he has been consulted as an expert in 15 prior stall spin accidents involving both the AA1 and the AA1B series of airplanes. I recognize your order and that's why I'm here to see you at sidebar because unlike a situation where the statistics

are in, this would be his own, as a factual matter, his own participation in such accident investigations and actions as a consultant.

And the purpose of this testimony would be to show that there was notice to the company of stall spin accidents that he has actual factual knowledge of participation in and then get into the studies that were done in connection with the stall spin characteristics including the NASA film.

MR. McKISSOCK: I object to that, your Honor, this is just reopening the whole thing of other accidents, other incidents that I thought was ruled on by the Court previously and it's getting into entirely extraneous matters. We have to basically try everyone of those other accidents and it's highly prejudicial to us.

MR. WOLK: The other, if I could just make one other point to you, if I may, and that is that on the punitive liability issue, the notice of the prior accidents, I understand your ruling on statistical data. I have no problem, I can work with that. But on the issue of this man's actual knowledge and the actual notice to the company of the accident histories that he was involved with, that's 15 of them, it seems to me it's different.

THE COURT: The problem is I don't know if they're substantial and similar to what has occurred in this case.

MR. WOLK: But he's saying —

THE COURT: *And I'm concerned if we get into 15 other situations then we're going to be trying 15 other cases. Mr. McKissock would have the right to cross-examine him about the nature of the other 15, whether they were the same or whether they weren't the same. I think that's going to unduly prolong the trial, so I'm going to sustain the objection.*

MR. WOLK: All right, there's another point —

MR. GENTER: The other, the other thing is perhaps, and maybe I'm confused about —

THE COURT: Just put your name on the record.

MR. GENTER: Richard Genter. Judge Ludwig, in the *Schofield* case and we had submitted the brief to you

> on allowed, since the compensation liability is so intertwined with the punitive liability case that the evidence has to come in, otherwise you'd have to call this witness back again.
>
> THE COURT: Well, you may have to call him back. I don't know what, but I don't have anything, any evidence of this point that they are substantially similar *and we're not going to try 15 other cases here that will unduly prolong the trial.* So, I will sustain the objection.

(N.T. Nov. 3, 1993 at 237-38) (J.A. at 980-83).

The jury was prevented from hearing not only about those fifteen accidents, but about other accidents which prompted a certification re-evaluation by the FAA, an evaluation which tied into testimony the trial court did allow about pre-certification problems. Mr. Antoniou, the engineering test pilot, told the jury about a number of evaluation flights he made in the 1960s while the aircraft was in the prototype stage, as a result of which he discovered a number of problems in the AA-1 prototype aircraft. Mr. Antoniou testified that the prototype was unsuitable as a primary trainer for teaching students how to fly because it had problems with controllability; that is, with its stability control. (N.T. Nov. 3, 1993 at 197).

Mr. Antoniou prepared a flight test evaluation report in which he reported unbalanced flight conditions prior to stall, a condition which normally resulted in a spin, and which he believed merited further evaluation. Mr. Antoniou also found the aerodynamic stall warning to be negligible to nonexistent in all configurations tested. (N.T. Nov. 3, 1993 at 198, 199) (J.A. at 941, 942). Mr. Antoniou determined that there were several areas — loss of stability as stall was approaching, bilateral directional dynamic stability characteristics, landing characteristics, and sink rate characteristics — which required re-evaluation as they affected safety of flight and the suitability of the airplane to perform its intended role as a primary trainer for student pilots. (N.T. Nov. 3, 1993 at 202) (J.A. at 945).

Mr. Antoniou's recommendations for correcting the problems with the airplane were not heeded. Grumman failed to take steps recommended by Mr. Antoniou to clean up the

drag characteristics of the airplane: the company did not increase the wing area to reduce the required angles of attack, did not reshape or clean up the fuselage or other high drag areas, did not increase the aspect ratio to improve wing efficiency, nor did it do any combination of these steps. (N.T. Nov. 3, 1993 at 226, 228) (J.A. at 971). In other words, though Grumman could have redesigned the aircraft to correct these problems to make it suitable for use as a primary trainer, they did not do so. (N.T. Nov. 3, 1993 at 230-31) (J.A. at 973-74).

After Mr. Antoniou resigned from the company, the aircraft was signed off for public use by a designated engineering representative, a company employee who stood in the shoes of the FAA, and a type certificate was issued. (N.T. Nov. 3, 1993 at 232) (J.A. at 975). Each of the AA-1 series models — the AA-1, AA-1A, AA-1B, and AA-1C — share a type certificate, which means that there was no major change in design for each model in the series. (N.T. Nov. 3, 1993 at 233-34) (J.A. at 976-77).

A series of stall/spin accidents prompted the FAA to conduct a certification review of the AA-1A and AA-1B aircraft after defendants had certified them under their DER authority to look into the very issues Mr. Antoniou had warned about while the aircraft was in the production stage. The FAA "formally notif[ied] American Aviation Corporation of our desire to conduct a re-evaluation of the stall and spin characteristics of the Models AA-1 and AA-1A". The "decision to take this step has been prompted by a relatively high percentage of stall/spin related accidents in the AA-1 and AA-1A in relation to the number of registered aircraft." (J.A. at 281). In response to a request by Grumman for additional information relating to the FAA's decision, the FAA advised "that based on service history the FAA was attempting to determine if there was a possible unsafe feature," and "was becoming increasingly concerned with the frequency of stall-spin accidents. . . .", all of which was confirmed by Grumman's own business records. (P-14) (J.A. at 286).

In fact, the flight test report issued by the FAA stated that flight test evaluation was conducted for the following reason:

> During the period of November 2, 1969 to July 1, 1973, there were a total of fourteen stall/spin accidents involving the American Models AA-1, AA-1A, and AA-1B Airplanes. Available evidence indicated that seven of these accidents probably were flat spins. As a result of the flat spin accidents, the FAA conducted an airworthiness certification review of these airplanes' stall-spin characteristics to determine that they are in compliance with the provisions of FAR 23.221(a) and (b) as originally certificated for the Normal and Utility categories.
>
> . . . .
>
> After reviewing the available accident information . . . and spin accident statistics of other similar airplanes, AGL-210 concluded that it was apparent that spins were being performed intentionally (spins are prohibited) and that *the only significant grounds for investigating these airplanes was the occurrence of four probable flat spin accidents.* During the course of this investigation, three more probable flat spin accidents occurred.

(J.A. at 308, 309, 366, 367, 380, 381). Ignoring the language that "the only significant grounds for investigating these airplanes was the occurrence of four probable flat spin accidents," the trial court reached the conclusion that the FAA's action was prompted by a concern about pilots performing intentional spins and, in the court's view, "did not identify any problem with the craft's normal operation." (App. 15a).

The jury never knew about any of these documents because the trial court deemed the FAA reports and related correspondence to be irrelevant to the "issues involved in this case." (N.T. Nov. 4, 1993 at 32) (J.A. at 1042). The trial court precluded any reference to other accidents, ultimately ruling that this evidence, if it came in, would only be admissible on the issue of any punitive damages to be awarded, an issue the trial court bifurcated. (N.T. Nov. 3, 1993 at 237-38) (J.A. at 980-83). In addition to ruling this evidence to be inadmissible in plaintiffs' direct case, the trial court also precluded any reference to any of these documents or to the accident history during cross-examination of defense witnesses.

After asking the district court whether there were any other accidents, the jury returned a verdict in favor of defen-

dants and against plaintiffs. (N.T. Nov. 10, 1993 at 122, 124)(J.A. at 247, 2037, 2039). The jury answered "no" to the questions "[w]as the AA1B aircraft defective at the time it was sold" and "[w]ere defendants Grumman/Gulfstream negligent". (N.T. Nov. 10, 1993 at 122) (J.A. at 247). Judgment was entered based on the answers of the jury to the special interrogatories. (J.A. at 252).

Plaintiffs filed a motion for new trial and for judgment as a matter of law because the rulings taking the accident history away from the jury was legal error, warranting the grant of a new trial. (J.A. at 253-59). The district court denied the motion for new trial as to the exclusion of plaintiffs' proposed other accidents evidence because "despite the court's stated concerns, plaintiffs never submitted any evidence or made an offer of proof from which the court could have made a determination of admissibility," (App. at 7a), and that this testimony was excluded "only after plaintiff was afforded ample opportunity to make the requisite showing of similarity." (App. at 8a). The court reasoned that "allowing the testimony would have led to a series of 'mini-trials' as counsel explored the circumstances surrounding each of the 15 other accidents" and concluded that it was therefore properly excluded under Rule 403. (App. at 8a-9a). The court reached the same conclusion under Rule 403 with respect to the testimony relating to the FAA's re-evaluation of the airplane. (App. at 13a).

Plaintiffs took a timely appeal to the United States Court of Appeals for the Third Circuit. After entertaining oral argument, the Third Circuit affirmed on December 9, 1994. (App. at 2a). The subsequent petition for rehearing was denied on January 9, 1995. (App. at 1a).

REASONS FOR GRANTING THE WRIT

Consideration by the Court is necessary because of the effect of the blanket preclusion order by the trial court, entered without first seeing the evidence and without allowing plaintiffs to lay a foundation, which was rubberstamped by the court of appeals. The effect of the decision is to create non-

uniformity between the federal courts and the state courts in applying Pennsylvania law because the decision of the trial court and the court of appeals is given precedential effect — a federal court sitting in diversity applying Pennsylvania products liability law will not permit evidence of prior accidents, but state courts required to follow the law of the appellate courts of Pennsylvania will be required to allow such evidence.

This Court's decision in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), was prompted by a concern that rights would vary according to whether enforcement was sought in state or federal court. *Id.* at 74-75. The twin aims of the *Erie* rule, "discouragement of forum shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer,* 380 U.S. 460, 468 (1965), are surely implicated here. Petitioners have been deprived of meaningful review of their state law claims solely because this case was adjudicated in a federal forum, contrary to the goals of *Erie* and its progeny. Litigating in a federal forum should not be outcome-determinative, and certainly rulings like those made in this case have rendered the federal courts a very hostile environment for plaintiffs to litigate products liability claims. If the federal trial courts make decisions that evidence will not be allowed in, even though the same evidence would come in had the case been litigated in state court, then there is no justice or fairness, the promise and premise of the federal courts.

Reviewing an evidentiary determination for abuse of discretion does not mean no appellate scrutiny whatsoever, particularly where application (or in this case, non-application) of a legal standard is in question. In upholding the erroneously based decision of the district court, the Third Circuit, it may truly be said,

> Has so far departed from the accepted and usual course of judicial proceedings. . .as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10(a)(1).

Moreover, the federal courts have engrafted a requirement that other accidents must be "substantially similar" in order to be relevant and admissible as a matter of federal evidence law. Four of the courts of appeals — the Fifth, Seventh,

Tenth, and District of Columbia Circuits — have relaxed the degree of similarity requirement where, as here, the other accidents evidence is being offered to show notice. Not so the Third Circuit. As a matter of federal evidence law, then, the Court's guidance is needed to address the standard where the other accidents evidence is not introduced to show dangerousness or defect but to show notice or knowledge thereof.

I. THE IMPRIMATUR OF THE THIRD CIRCUIT ON THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONERS TO LAY A FOUNDATION TO SHOW SUBSTANTIAL SIMILARITY GOES TO THE VERY UNDERPINNINGS OF OUR ADVERSARIAL SYSTEM AND REQUIRES THE COURT'S REVIEW.

"In product liability actions, the occurrence of similar accidents or failures involving the same product has great impact on a jury, as it tends to make the existence of the defect more probable than it would be without the evidence." *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1440 (10th Cir. 1992). *See also* Fed. R. Evid. 401. "A manufacturer's knowledge of other similar accidents is probative of the manufacturer's knowledge of defect and of whether the design was inadequate." *Walker v. Messerschmitt Bolkow Blohm GmBH,* 848 F.2d 496, 497 (5th Cir. 1988). "In such actions, courts routinely permit the introduction of substantially similar acts to demonstrate notice, the existence of a defect, or to refute testimony given by defense witnesses." *Four Corners Helicopters,* 979 F.2d at 1440.

Generally, the admission of evidence "regarding prior accidents or complaints is predicated upon a showing that the circumstances surrounding them were substantially similar to those involved in the present case." *Karns v. Emerson Electric Co.,* 817 F.2d 452, 460 (10th Cir. 1987). *Accord Exum v. General Electric Co.,* 819 F.2d 1158, 1162 (D.C. Cir. 1987); *Johnson v. Colt Industries Operating Corp.,* 797 F.2d 1530, 1534 (10th Cir. 1986); *Brooks v. Chrysler Corp.,* 786 F.2d 1191, 1195 (D.C. Cir.), *cert. denied,* 479 U.S. 853 (1986). "Whether a reasonable inference may be drawn as to the harmful tendency or capacity of [a product] from prior failures depends upon whether

the conditions operating to produce the prior failures were substantially similar to the occurrence in question." 2 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE ¶ 401[10] (1987) (quoting *Jones & Laughlin Steel Corp. v. Matherne,* 348 F.2d 394, 400 (5th Cir. 1965)).

The underlying theme in the case law is that the party seeking to offer other accidents evidence has to be given an opportunity "to establish certain facts about the other accidents that permi[t] a useful comparison to be made." *Nachtsheim v. Beech Aircraft Corp.,* 847 F.2d 1261, 1269 (7th Cir. 1988). "The typical and preferable method of introducing such evidence is through the testimony of one familiar with the similar accident or the subsequent litigation." *Ponder v. Warren Tool Corp.,* 834 F.2d 1553, 1560 n.8 (10th Cir. 1987) (quoting *Johnson,* 797 F.2d at 1534 n.4). "Nonetheless, this procedure is not mandatory provided the evidence proffered by the plaintiff is sufficiently substantial, probative, and reliable." *Ponder,* 834 F.2d at 1560 n.8.

The uncontroverted record was that:

1. Other accidents evidence of any kind was precluded as "irrelevant to the issues in this case," (N.T. Nov. 4, 1993 at 32) (J.A. at 1042), even though other accidents are relevant to the issue of notice under Pennsylvania products liability law and federal evidence law and plaintiffs informed the trial court this was the reason the evidence was being proffered. (N.T. Nov. 3, 1993 at 238) (J.A. at 981).

2. The trial court ruled before the trial began that evidence of other accidents would be prohibited even though no documents were attached to defendants' motions in limine nor did defendants make any reference in their motions to what witnesses were expected to testify about what other accidents, thus deciding in a vacuum that other accidents evidence was irrelevant without even knowing what the other accidents evidence was going to be. (J.A. at 56-62, 68-87, 96-105).

3. On the first day of trial, before a single witness was sworn, and before any testimony was taken or a single document received into evidence, the trial court cau-

tioned plaintiffs' counsel that his witnesses were not to "mention any other accident. I've ruled on that." (N.T. Nov. 3, 1993 at 10) (J.A. at 753).

4. The trial court precluded plaintiffs from offering testimony from one of their experts about fifteen accidents he personally investigated because "we're not going to try 15 other cases here that will unduly prolong the trial," a judgment made without hearing what the witness had to say. (N.T. Nov. 3, 1993 at 237-38) (J.A. at 980-83).

5. The trial court precluded the plaintiffs from introducing, referring to, or otherwise using a flight test evaluation report prepared after a certification review by the Federal Aviation Administration, which was prompted by a number of stall and spin accidents, or any other evidence relating to the certification review, concluding that the FAA was concerned with intentional spins, although to do so the court had to disregard the plain language of the report which indicated that the FAA was concerned about the safety-of-operation characteristics of the aircraft because of the unusually high number of accidents, and plaintiffs' witnesses would have so testified had the court permitted them to do so. (J.A. at 281- 434).

6. The trial court did not allow plaintiffs to use any evidence of other accidents on cross-examination, even though defense witnesses were permitted to testify that the aircraft had no accident history whatsoever and that the FAA had given the aircraft a clean bill of health, the FAA flight test evaluation report notwithstanding. (N.T. Nov. 8, 1993 at 228-230, 233, 238-39, 243-44, 247-48, 253) (J.A. at 1664-66, 1669, 1674-75, 1679-80, 1683-84, 1687).

7. The trial court did not allow plaintiffs to use other accidents or the FAA flight test evaluation report on redirect after defendants opened the door during the cross-examination of plaintiffs' witnesses by inviting comparison to training airplanes manufactured by other aircraft manufacturers. (N.T. Nov. 3, 1993 at 165-66; N.T. Nov. 4, 1993 at 37, 137-39, 140) (J.A. at 908-09, 1047, 1147-49, 1150).

8. The first question the jury asked as it deliberated was whether there were any other accidents. (N.T. Nov. 10, 1993 at 120-21) (J.A. at 2037-38).

What the trial court did was to issue a blanket preclusion order prohibiting other accidents for *any* purpose, an order from which the court would not stray, not only in disallowing this evidence in plaintiffs' direct case, but in repeatedly rebuffing plaintiffs' efforts to use any of this evidence to cross-examine defense witnesses or rehabilitate plaintiffs' witnesses on redirect. The effect of so sanitizing the trial was reflected not only in the verdict but in the jury's own inquiry into the accident history of the AA-1 series airplane.

The blanket preclusion order likewise deprived plaintiffs of the ability to prove negligence and strict liability theories under Pennsylvania law. Evidence of other accidents is admissible in negligence and products cases to show notice and as a matter of substantive proof. *Yoffee v. Pennsylvania Power & Light,* 385 Pa. 520, 123 A.2d 636, 648-49 (1956); *DiFrancesco v. Excam, Inc.,* 434 Pa. Super. 173, 642 A.2d 529, 537 (1994).

The Third Circuit uses the familiar abuse of discretion standard in reviewing evidentiary rulings, and while evidentiary rulings are viewed under an abuse of discretion standard, the failure to apply a legal standard is reviewed is subject to plenary review. *Lippay v. Christos,* 996 F.2d 1490, 1496 (3d Cir. 1993). Had the Third Circuit applied its own standard here, it could not and would not have affirmed the trial court. A trial court which does not allow a plaintiff to lay a foundation of substantial similarity or to otherwise utilize evidence necessary to sustain the burden of proof has not abused its discretion but, rather, has failed to exercise any discretion at all. A reviewing court which rubberstamps abusive discretion with a judgment order has departed from the duty of responsible appellate review.

A petition for writ of certiorari exposes the entire case for review. *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 817 (1988). The Supreme Court reviews judgments, not opinions. *Bowen v. American Hospital Association,* 476 U.S. 610, 626 (1986) (plurality opinion). Mrs. Aladdin and Mrs. Dunlap are entitled to review, and not simply to an

appellate court summarily disposing of another diversity case in order to clear its docket. The Court has in the past granted certiorari to review evidentiary determinations by trial courts and has found abuse of discretion, *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153 (1985), being a recent example. The Court should grant certiorari in this case to review the whole case and the discretion abused here.

II. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE QUANTUM OF PROOF REQUIRED FOR SHOWING SUBSTANTIAL SIMILARITY, THEREBY REQUIRING THE COURT'S INTERVENTION AND GUIDANCE AS TO THE APPROPRIATE STANDARD OF PROOF AND IF THE STANDARD MAY BE RELAXED WHERE NOTICE IS THE ISSUE SOUGHT TO BE PROVEN.

Rule 404 of the Federal Rules of Evidence, which governs other accidents evidence, says nothing about other accidents evidence being substantially similar to the accident at issue in a particular case. *See* Fed. R. Evid. 404(b). The substantial similarity requirement has been engrafted on to the rule as a matter of federal evidence law. The substantial standard is not applied rigidly but is subject to a sliding scale of similarity based upon the reason why the evidence is being offered.

Several courts of appeals, although not the Third Circuit, apply a relaxed standard where other accidents evidence is offered to show notice. *See, e.g., Carey v. Hy-Temp Manufacturing, Inc.,* 929 F.2d 1229, 1235 n.2 (7th Cir. 1991) ("Substantially similar" does not mean "identical" and range between "substantially similar" and "identical" is specifically broadened when similar events are used to show notice to manufacturer as opposed to showing defect in product); *Shields v. Sturm, Ruger & Co.,* 864 F.2d 379, 381 (5th Cir. 1991) (rule that other accidents must be substantially similar to one at issue is relaxed where evidence is introduced to show notice of a dangerous condition); *Ponder v. Warren Tool Corp.,* 834 F.2d 1553, 1560 (10th Cir. 1987) (where evidence of other accidents is used to show notice of awareness of dangerous condition, rule requiring substantial similarity of other accidents should

be relaxed); *Exum v. General Electric Co.*, 819 F.2d 1158 (D.C. Cir. 1987) (if accident is offered to prove notice, lack of exact similarity of condition will not cause exclusion provided accident was of a kind which should have served to warn defendant). The District of Columbia Circuit, in fact, has gone so far as to hold that the substantial similarity standard is relaxed where the unrelated accidents are offered for any purpose other than to prove the product was unreasonably dangerous. *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 555 (D.C. Cir. 1993).

The courts which have applied this relaxed standard have stated that the quantum of proof necessary to lay a foundation of substantial similarity depends upon the reason(s) why the evidence is being offered:

> In determining whether accidents are "substantially similar," the factors to be considered are those that relate to the particular theory underlying the case. Differences in the nature of the defect alleged may affect a determination whether the accidents are substantially similar. *See, e.g., Jackson,* 788 F.2d at 1083 ("[T]he 'substantially similar' predicate for the proof of similar accidents is defined . . . by the defect. . .at issue.") Moreover, "[h]ow substantial the similarity must be is in part a function of the proponent's theory of proof." *Exum,* 819 F.2d at 1162. "If dangerousness is the issue, a high degree of similarity will be essential. . . .If the accident is offered to prove notice, a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant."

Exum, supra, 819 F.2d at 1162-63 (*quoting* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[10], at 401-66-67 (1987)). When evidence of other accidents is used to prove notice or awareness of a dangerous condition, the rule requiring substantial similarity of those accidents to the one at issue should be relaxed. *Jackson, supra,* 788 F.2d at 1083. Once a court has determined that accidents are substantially similar, "[a]ny differences in the circumstances surrounding those occurrence go merely to the weight to be given the evidence." *Ponder v. Warren Tool Corp., supra,* 834 F.2d at 1560 (footnote omitted).

"Substantially similar" does not mean "identical." *Carey v. Hy-Temp Manufacturing, Inc.*, 929 F.2d 1229, 1235 n.2 (7th Cir. 1991). Rather, "[t]he range between similar and identical is a matter to be addressed on cross-examination." *Id.* at 1235.

The types of factors necessary to show sufficient similarity as to plaintiffs' theory of defect here include the type of spin, weather conditions, altitude, and instructional or pilot practice. To show notice or knowledge of the propensities of the product, on the other hand, plaintiffs need not have shown that the accidents occurred in precisely the same manner, any differences going to the weight of the evidence. *Jackson, supra*, 788 F.2d at 1083. "How substantial the similarity must be is in part a function of the proponent's proof." *Exum, supra*, 819 F.2d at 1162.

Unlike the other courts of appeals, the Third Circuit has not developed a body of other accidents case law. The two most frequently cited other accidents cases, *Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3d Cir. 1983) and *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958), involved the law of the Virgin Islands and pre-strict liability Pennsylvania negligence law, respectively, and pre-date the developing body of federal evidence law employing the relaxed standard in notice cases.

Certainly the evidence of record, showing actual notice to Grumman from the government of the dangerous aerodynamic characteristics of the airplane, meets this relaxed standard. The Court should grant certiorari to resolve the question whether a relaxed standard of proof is implicated in notice cases.

CONCLUSION

For the reasons set forth above, petitioners urge that this petition for writ of certiorari be granted.

Respectfully submitted,

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(215) 545-4220

Counsel for Petitioners

*Counsel Of Record

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1552

DIANE ALADDIN, Administratrix of the Estate of Ziad Aladdin, Deceased and DIANE ALADDIN, In Her Own Right, and DONNA DUNLAP, Executrix of the Estate of Carl Dunlap, Deceased and DONNA DUNLAP, In Her Own Right,
Appellant,

v.

GRUMMAN AMERICAN AVIATION CORPORATION and GULFSTREAM AEROSPACE CORPORATION,
Third-Party Plaintiffs

v.

HORTMAN AVIATION, INC.,
Third-Party Defendant.

Before: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: JAN 9 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1552

DIANE ALADDIN, Administratrix of the Estate of Ziad Aladdin, Deceased and DIANE ALADDIN, In Her Own Right, and DONNA DUNLAP, Executrix of the Estate of Carl Dunlap, Deceased and DONNA DUNLAP, In Her Own Right,
Appellant,

v.

GRUMMAN AMERICAN AVIATION CORPORATION and GULFSTREAM AEROSPACE CORPORATION,
Third-Party Plaintiffs

v.

HORTMAN AVIATION, INC.,
Third-Party Defendant.

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 92-cv-03918)
(District Judge: Honorable Harvey Bartle, III)

Argued on December 6, 1994

Before: STAPLETON, ROTH and LEWIS, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the District Court entered April 22, 1994, be and is hereby affirmed.

Costs to be taxed against appellants.

BY THE COURT:

/s/ Jane R. Roth
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: DEC 9 1994

Certified a true copy and issued in lieu
of a formal mandate on January 17, 1995

Teste: /s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE ALADDIN, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
GRUMMAN AMERICAN AVIATION CORPORATION, et al.	:	NO. 92-39 18

MEMORANDUM

Bartle, J. April 22, 1994

This case arises out of the fatal crash of a two seat, single engine aircraft, in which Ziad Aladdin and Carl Dunlap were killed.

Plaintiffs, the widows of the decedents, brought wrongful death and survival actions against the designer and manufacturer of the aircraft, defendants Grumman American Aviation Corporation ("Grumman") and Gulfstream Aerospace Corporation ("Gulfstream"), the corporate successor to Grumman. The case proceeded to trial before a jury on theories of strict liability and negligence. The jury returned a verdict in favor of defendants on both theories. Before the court is the plaintiffs' motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure[1] or, in the alternative, for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.

The accident occurred on July 29, 1990, in Springfield, New Jersey, while Ziad Aladdin, a student pilot, was receiving training and instruction from pilot Carl Dunlap. Plaintiffs alleged that the Grumman AA-1B aircraft in which the decedents were flying was defective in design in that it was unsuit-

1. Rule 50(b) provides in pertinent part that: Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted their action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. . . .

able as a primary training vehicle.[2] Specifically, plaintiffs contended that the airplane stalled easily without sufficient warning to the student pilot.[3] According to plaintiffs, once the aircraft stalled it had a tendency to go into an unintentional spin before the instructor could correct the problem. Defendants contended that the airplane was suitable for use as a trainer and that the accident resulted from reckless flying.

Plaintiffs' motion for judgment as a matter of law merits little discussion. Judgment as a matter of law is appropriate only where the court finds that "the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir. 1987), *Cert. denied*, 484 U.S. 853 (1987) (citations omitted). In making this determination, the court must view the evidence in the light most favorable to the non-moving party and may not weigh evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. *Id.* In this case, plaintiffs simply assert, without any analysis of the evidence adduced at trial, that a reasonable jury could not reach a finding for the defense. To the contrary, the record contains sufficient evidence, including expert and eyewitness testimony, to support the jury verdict. That evidence included expert opinion that the aircraft was not defective and testimony from which the jury could find that the accident resulted from reckless low flying. An eyewitness, on the ground, who was unrelated to any of the parties, testified that just prior to the accident the aircraft twice "buzzed" her, once as low as 20-30 feet above ground. N.T. 11/9/93, pp. 59-67. Consequently, the motion for judgment as a matter of law will be denied.

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2. Evidence a trial showed that the AA-1B was part of a series of aircraft which included the AA-1, AA-1A and AA-1B. These airplanes shall be referred to collectively as the "AA-1 series".

3. A stall occurs where the airplane, in gaining altitude, exceeds the critical angle of attack and loses the air pressure which creates lift. Students are generally taught how to anticipate and prevent stalls.

In addition, plaintiffs move for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure because of alleged errors the court made during trial. Rule 59(a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

A new trial in appropriate where the jury's verdict is against the great weight of the evidence or where errors at trial have meant that substantial justice was not accomplished. *See e.g. Roebuck v. Drexel University,* 852 F.2d 715 (3d Cir. 1988); *Black v. Stephens,* 662 F.2d 181 (3d Cir. 1981), *cert. denied* 455 U.S. 1008 (1982). The mere existence of error is not sufficient to warrant the granting of a new trial. Rather, the error must have been so prejudicial that refusal to grant the motion "appears to the court inconsistent with substantial justice," Fed. R. Evid. 61;[4] *Bhaya v. Westinghouse Electric Corp.,* 709 F. Supp. 600, 601 (E.D. Pa. 1989).

Plaintiffs first contend that the court erred in excluding evidence of other accidents involving the same or similar aircraft. Evidence of other accidents is admissible to show both notice and the existence of a defect. *Gumbs v. International Harvester, Inc.,* 718 F.2d 88, 92 (3d Cir. 1983). However, other accidents may not be admitted unless the party seeking to introduce such evidence makes a threshold showing of substantial similarity between the evidence sought to be admitted and the accident at issue in the underlying case. *Gumbs, supra;*

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4. Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Prashker v. Beech Aircraft Corporation, 258 F.2d 602, 607 (3d Cir. 1958), *cert. denied* 358 U.S. 910 (1958). Even where evidence is technically admissible, this court has broad discretion to exclude it pursuant to Rule 403 of the Federal Rules of Evidence.[5] *See e.g. John McShain, Inc. v. Cessna Aircraft Co.,* 563 F.2d 632, 636 (3d Cir. 1977); *Johnson v. Ford Motor Co.,* 988 F.2d 573, 579 (5th Cir. 1993).

Plaintiffs assert that this court imposed a blanket prohibition against evidence of other accidents on relevance grounds and failed to permit plaintiffs the opportunity to lay a foundation for the introduction of such evidence. Specifically, plaintiffs contest the exclusion of testimony by their expert, Mr. Michael Antoniou, concerning 15 other stall-spin accidents involving the AA-1 series. Plaintiffs state that this evidence would have been relevant to show notice to Grumman of stall-spin problems. The court excluded the testimony because plaintiffs failed to provide the court with any information from which it could determine that the other accidents were sufficiently similar to the accident involved in this case. The court alerted plaintiffs to the fact that such evidence was lacking. N.T. 11/3/93 pp. 238-39. However, despite the court's stated concerns, plaintiffs never submitted any evidence or made an offer of proof from which the court could have made a determination of admissibility.

Plaintiffs now suggest that if the court "had misgivings about substantial similarity" it should have held an in camera hearing to resolve the question. Plaintiffs, however, did not request such a hearing. It is not the province of this court to advise the parties as to how to present evidence. Furthermore, the court did in fact give plaintiffs the opportunity to argue the admissibility of other accidents and to present evidence on the question:

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5. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> COURT: Also, I want to hear you at the end of the day on the — on whether or not you can introduce the fact that there were other spin accidents. There were some that were inadvertent or indicated to be inadvertent and I will hear you at the end of the day on that . . . as to whether that should be admissible or those accidents should be admissible.
>
> MR. WOLK [counsel for plaintiffs]: Okay. I won't have a witness because my witness — I had two witnesses on the subject. Ray Conway, who's gone, although I guess I can bring him back, and the second one was Mike Antoniou who has got to go back to California today.
>
> COURT: Well, there are a number of ways of introducing them, to read to the jury the fact that these occurred and the dates. So —
>
> MR. WOLK: All right.
>
> THE COURT: — I don't know —
>
> MR. WOLK: That's something we can — I'll worry about that. That really my problem to worry about.

N.T. 11/4/93, p. 4.

As the record indicates, this court heard extensive argument concerning the admissibility of other accident evidence after the close of testimony on November 4, 1993. See N.T. 11/4/93, pp. 260-88. Plaintiffs' counsel did not seek to introduce testimony of his expert at that time, nor did he request that such testimony be heard at a different time. Thus, this court excluded Mr. Antoniou's testimony only after plaintiff was afforded ample opportunity to make the requisite showing of similarity.

Additionally, as the court pointed out, allowing the testimony would have led to a series of "mini-trials" as counsel explored the circumstances surrounding each of the 15 other accidents. Rule 403 of the Federal Rules of Evidence grants the trial court broad discretion to exclude evidence which, though relevant, may cause "undue delay, waste of time, or

needless presentation of cumulative evidence." The exclusion of plaintiffs' expert testimony concerning other accidents was proper.

Plaintiffs also object to the exclusion of a summary of accidents involving the AA-1 series compiled by the Federal Aviation Administration ("FAA"), marked as Exhibit P-40, attachment V.[6] Plaintiffs argue that the summary was relevant to show that defendants had notice of other stall-spin accidents and that it qualified for the "public records" hearsay exception set forth in Rule 803(8)(C). That rule provides that the following are not excluded:

> (8) Public Records and Reports.
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The FAA summary lists 16 spin accidents. It provides the date, type of spin, location, altitude and a very abbreviated description of each accident. A note at the end of the summary states that the "cause" is a summary of the facts listed in the applicable accident report. Plaintiffs did not provide the related accident report. Given the cursory nature of the information provided, the FAA summary did not permit this court

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6. Plaintiffs also complain of the exclusion of a list of spin accidents involving the AA-1 series of aircraft compiled by the National Transportation Safety Board (the "NTSB") marked as Exhibit P-113. Plaintiffs fail to point to any discussion of this document or to any objection to its exclusion on the record. This court has found none. Regardless, the NTSB list merely states the location, registration number, date and model of the aircraft involved. It contains no information regarding the type of accident or the cause. Clearly this document fails to meet the threshold requirement of substantial similarity and would not have been admissible in any case.

to make the requisite finding of substantial similarity.[7] In excluding these documents, the court explained that in addition to the summary nature of the accident descriptions, it had no way of knowing how the underlying reports were prepared or who prepared them. Consequently, the court properly found that the lack of information undermined the trustworthiness of the document. N.T. 11/5/93, pp. 49-50. *See John McShain, Inc.*, 563 F.2d at 636.

Plaintiffs also sought to introduce a spin accident summary which defendant produced in discovery and was captioned, "Spin Accident Summary," marked as Exhibit P-38. The second page was titled, "Grumman American Summary of Incident." Plaintiffs contend that the document was an admission by defendants and therefore did not constitute hearsay pursuant to Rule 801(d)(2) of the Federal Rules of Evidence. That section provides that a statement of a party opponent is not hearsay if:

> The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. . . .

In order to introduce a statement of a party opponent as an admission, the party seeking to introduce it must produce at least prima facie proof that the statement was made by the party opponent or by someone whose statements may legally affect him. 31A. C.J.S. Evidence, 371 (1964). *See also, Vockie v. General Motors Corporation*, 66 F.R.D. 57, 63 (E.D. Pa. 1975), *aff'd* 523 F.2d 1052 (3d Cir. 1975); *White Industries, Inc.*

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7. Furthermore, of the 16 accidents listed in the summary, 2 listed the cause as unknown and 5 others concerned accidents resulting from intentionally induced spins. Plaintiff conceded that accidents involving intentional spins would not be relevant to the present case.

v. Cessna Aircraft Co., 611 F. Supp. 1049, 1065 (W.D. Mo. 1985). The mere fact that a document is found in the files of a corporation or is produced in discovery does not, without more, constitute evidence of authorship or adoption by that corporation. *See White Industries, supra* at 1059.

This court conducted an extensive inquiry, which included in camera testimony of Gulfstream Aerospace Corporation's deputy general counsel, Thomas Ramee, in an attempt to adduce the origin of the document. *See* N.T. 11/5/93, pp. 39-48. Defendant's attorney stated, and Mr. Ramee testified, that they believed that the document came from a law firm that had previously represented Grumman in other cases. *See* N.T. 11/5/93, pp. 37-38, 45-58. Plaintiffs' attorney conceded that the document most likely came from the files of another law firm. *Id.* at 38. After hearing the testimony, this court correctly concluded that the document was inadmissible hearsay:

> The document itself does not indicate who prepared it, under what circumstances it was prepared. It has not been proved that this is a document that was adopted by Grumman or a document where they admitted the nature of the accidents. Therefore, it will not be admitted into evidence at this time. The fact that a document may have appeared in someone's files does not mean that it is necessarily adopted or conceded to be true by the person or company in whose files it may be found . . .

Furthermore, this summary suffers from the same lack of detail as did the FAA summary. It provides only a cursory description of the type of accident involved. Consequently, it did not establish that the accidents involved were substantially similar to the accident in this case.

Plaintiff also objects to this court's exclusion of an evaluation of the Model AA-1 series conducted by the FAA during 1973-74, marked as Exhibit P-40. The FAA report was issued on January 1, 1974. Although the FAA found that the AA-1 series complied with the applicable certification rules, the report contained the following language which plaintiffs sought to introduce:

> Although the subject airplanes in this report were found to be in compliance with the applicable FAR 23 certification criteria for the Normal Utility Categories, the airplanes were considered to reflect a safety of operation problem as a result of their being marketed and defined as a "Trainer" and as airplanes used extensively by pilot trainees and instructors. It is quite conceivable to expect these particular types of users to experiment with the entire flight envelope including the aspects of uncontrolled flight (spin indoctrination) *even though prohibited.*

(emphasis added). The report then proceeded to make several recommendations for future action. The FAA subsequently reissued the report on April 30, 1974, deleting the recommendations section.[8]

Plaintiffs assert that the FAA report was admissible as a public record under Rule 803(8)(C) of the Federal Rules of evidence. They further contend that the above language illustrates that the AA-1B was unsuitable for use as a primary trainer. After reviewing the FAA report the court concluded that it was irrelevant to the issues in the case and therefore inadmissible. Specifically, the safety problem identified in the report resulted from the probability that student pilots were likely to experiment with *prohibited* maneuvers. It stated as a recommendation for future action, "[s]ince it appears probable that these particular airplanes will be operated *illegally* in an aerobatic environment . . . it is suggested that a placard . . . be installed that warns the operator of the limitations on spins."[9] In other words, the report reflected the drafters' con-

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8. At trial plaintiff asserted that the reissuance was the result of improper pressure from Grumman, and in support of this contention produced a letter from Grumman's president Russell W. Meyer, Jr. in which he complained that "certain phrases . . . are unnecessarily damaging to the company, since someone who did not know all the facts might make the wrong assumption." Because this court's determination of the admissibility of the document at issue does not turn on the fact that it was subsequently withdrawn, we need not address this issue here.

9. It is uncontested that the airplane at issue contained such a warning against spins.

cern that students were likely to misuse the aircraft. It did not identify any problem with the craft's normal operation.

The deposition of Charles Arnold, who performed the tests on the AA-1 series and prepared the FAA evaluation reports, further supports this court's conclusion concerning the irrelevance of the document.[10] Arnold stated that the recommendations were not specific to the Grumman aircraft but were based on his evaluation of numerous airplanes in its class, and his belief that a "spinnable airplane" should be available to the general public. With regard to the decision to remove the recommendation section, he stated:

> we felt that this was not the place to put this material since we made a specific finding on the airplane that the airplane itself was satisfactory to all of the existing regulations and rules. We elected to delete the material and present it in another form.[11]

(Arnold Deposition at 23).

Because plaintiffs never asserted that the accident in this case involved an intentional spin or any other prohibited aerobatic maneuver, the report had no relevance to the issues at hand. The court further found that even if relevant, the prejudice outweighed any possible probative value. N.T. 11/4/93, pp. 2-4. As other courts have recognized, the danger of unfair prejudice is magnified where government documents are concerned, as the "official" nature of the documents may cause the jury to give the evidence inordinate weight. *Johnson v. Ford Motor Co.*, 988 F.2d at 580, citing *Fowler v. Firestone Tire & Rubber Co.*, 92 F.R.D. 1, 2 (N.D. Miss. 1980). Clearly, the exclusion of the report was a valid exercise of the court's discretion pursuant to Rule 403 of the Federal Rules of Evidence.

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10. The court is not bound by the rules of evidence when considering information in aid of a determination of the admissibility of evidence. Fed. R. Evid. 104.

11. He further testified that the substance of the recommendation section was subsequently submitted as part of the FAA rule making process and became part of the routine rules review conference.

Plaintiffs next complain of the exclusion of certain correspondence between defendants and the FAA and of Grumman internal memoranda. The excluded documents concerned the FAA's desire to conduct a re-evaluation of the stall and spin characteristics of the AA-1 series. *See* Exhibits P-11-P-19. The court excluded these documents, finding that they constituted hearsay and were irrelevant. N.T. 11/8/93, p. 11. Letters from the FAA to defendants are clearly hearsay. The documents authored by executives of Grumman may qualify as admissions. However, the documents are only admissible if relevant. Plaintiffs assert that all the documents were relevant to show notice to the defendants.

None of the documents contains any admission that the product was defective. They merely discuss the FAA's request for a re-evaluation and the possibility that further testing may be necessary. Exhibit P-14, for example, is an internal memorandum written by Russell Meyer, a Grumman executive. Meyer states that he received a call from the FAA concerning the frequency of stall- spin accidents involving the AA-1 series and adds, "in summary, I believe this is a very, very high priority item. We need to review our data on the spin characteristics of the Trainer and put this program at the top of our priority list."

Even assuming, however, that the documents were admissible to show notice to defendants of the existence of a defect, the exclusion of these documents is harmless. As stated above, after the re-evaluation, the FAA determined that the AA-1 series met all relevant certification requirements. Furthermore, the jury made a factual determination that the aircraft was not defective. Notice can only be relevant where there exists a defect which defendant could have prevented or corrected. Consequently, the issue of notice is now moot.

Plaintiffs also assert that the exclusion of certain articles which appeared in a publication called *Aviation Consumer* was error. These articles were highly critical of the AA-1 series and contained extensive discussions of other accidents. Plaintiffs provide no analysis concerning the admissibility of these obviously hearsay documents. They simply make a blanket statement that this and other excluded evidence was relevant

to show that "defendants had actual notice of the accidents and ... was [sic] aware of recommendations to improve the safety of the aircraft." (Plaintiff's memorandum at 18). As stated above, given the jury's findings in the case, notice is irrelevant. Furthermore, given the highly prejudicial discussion of other unrelated accidents contained in the articles, exclusion was proper under Rule 403 of the Federal Rules of Evidence.

Plaintiffs next assert that evidence which may have been inadmissible on direct examination was nonetheless admissible on cross-examination. Specifically, plaintiffs contend that they should have been able to use the excluded FAA report to rebut testimony that the aircraft was certified as suitable by the FAA. *See* N.T. 11/8/93, pp. 238-39, 244. However, as explained above, the disputed portion of the FAA report did not concern unintentional spins and therefore had no relevance to the present case. It did not become relevant merely because defendants' witness stated accurately that the aircraft met certification requirements.

Plaintiffs also state that defendants opened the door to evidence of other accidents involving the AA-1 series by eliciting testimony concerning the suitability of the aircraft. Plaintiffs have not demonstrated, and this court fails to see, how evidence concerning unrelated accidents, absent a showing of substantial similarity, could be relevant to the issues in this case either on direct or cross-examination. However, even assuming that such evidence may have been admissible, the court was within its discretion to exclude it in order to prevent a lengthy and unfairly prejudicial excursion into collateral matters.

Finally, plaintiffs contend that the court committed error by charging the jury on the affirmative defense of "highly reckless conduct." Plaintiffs assert that the charge was not warranted by the evidence adduced at trial. The court charged the jury as follows:

> Furthermore, the designer of a product is not liable if the decedents' action was so reckless that decedents would have been injured despite the curing of

> any alleged defect or is so extraordinary and unforeseeable as to constitute a superseding cause.

N.T. 11/10/94, p. 102.

The language of the charge was taken directly from the recent decision of the Court of Appeals of this Circuit, *Dillenger v. Caterpillar,* 959 F.2d 430, 446 (3d. Cir. 1992). Given the eyewitness testimony from a person not connected with any of the parties that defendants were engaging in dangerous low altitude flying known as "buzzing" at the time of the accident, the charge was warranted. However, even if the charge was error, such error is harmless because the jury did not reach the special interrogatory to which that portion of the charge was directed. As stated above, the jury found neither a defective product nor negligence on the part of the defendants. Consequently, the jury was never required to consider the conduct of plaintiffs' decedents. *See Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

Plaintiffs' motion for judgment as a matter of law or for a new trial will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE ALADDIN, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
GRUMMAN AMERICAN AVIATION CORPORATION, et al.	:	NO. 92-39 18

ORDER

AND NOW, this 22nd day of April, 1994, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of plaintiffs for judgment as a matter of law or for new trial is DENIED.

BY THE COURT:

/s/ Harvey Bartle, III
J.

FEDERAL RULES OF EVIDENCE

Rule 403 of the Federal Rules of Evidence provides:

> **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

Rule 404 of the Federal Rules of Evidence provides, in pertinent part, as follows:

. . .

> **(b) Other crimes, wrongs, or acts**
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

Supreme Court, U.S.
FILED
MAY 10 1995
CLERK

No. 94-1699

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DIANE ALADDIN, et al.,

Petitioners,

v.

GRUMMAN AMERICAN AVIATION CORPORATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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20 pp

QUESTION PRESENTED FOR REVIEW

Whether a Judgment Order of the Court of Appeals for the Third Circuit, affirming the district court's discretionary exclusion of evidence of other accidents in a products liability diversity case, requires the issuance of a Writ of Certiorari where petitioners failed to establish a proper threshold foundation at trial that the other accidents were substantially similar to the accident at issue?

DISCLOSURE OF CORPORATE PARTIES

Grumman American Aviation Corporation is a defunct corporate entity, having been merged into Gulfstream Aerospace Corporation. Gulfstream Aerospace Corporation is a Georgia corporation that is wholly owned by Gulfstream Delaware Corporation, a Delaware holding company, which in turn is wholly owned by Gulfstream Aerospace Corporation, a Delaware holding company.

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STATEMENT OF THE CASE

Petitioners seek a writ of certiorari for review of a district court judgment, affirmed by the Third Circuit Court of Appeals, based upon alleged erroneous discretionary evidentiary rulings by the district court. The writ should be denied because the discretionary rulings in question simply do not merit review under Supreme Court Rule 10.1. There is no "split in the circuits" at issue, nor does the petition raise any important unresolved issue of law. On the contrary, the district court acted within its sound discretion in precluding evidence of or reference to other accidents because petitioners never made a threshold showing of substantial similarity at trial. This is merely a routine evidentiary issue that the district court resolved in accordance with well established law and petitioners have not come remotely close to establishing that there are special and important reasons for this Court to grant review.

I. BACKGROUND

This case arises out of the crash of a two seat, single engine aircraft during a training flight on July 29, 1990. The aircraft, a model AA-1B, was designed and manufactured by respondent Grumman American Aircraft Corporation and owned by Hortman Aviation, Inc. Hortman Aviation operated a flight school and employed petitioners' decedent Carl Dunlap, the certified flight instructor who was providing flight instruction to petitioners' decedent Ziad Aladdin, a student pilot, when the crash occurred.

Petitioners instituted suit against Grumman alleging product defect and negligence theories. Grumman joined Hortman Aviation as a third-party defendant in connection with the *Aladdin* claim. At trial, petitioners sought to establish that the AA-1B was unsuitable for use as a primary trainer and that it crashed during normal flight training procedures due to allegedly defective aerodynamic stall characteristics. Grumman presented evidence that the aircraft was not defective and that the accident

resulted from reckless low flying of the aircraft. The jury returned a verdict for the defense, finding no defect or negligence.[1]

II. EVIDENTIARY RULINGS AT ISSUE

The discretionary evidentiary rulings by the district court, which petitioners now ask this Court to review, were the subject of three motions in limine filed by respondents prior to trial. In these motions, respondents sought either to exclude certain evidence of other accidents entirely, or to preclude such evidence unless petitioners first made a threshold showing that the other accidents were "substantially similar" to the accident in question.[2] After full briefing and meeting with counsel, the district court granted all three motions. Having failed to make the necessary foundational showings at trial, petitioners now contend that these in limine rulings amounted

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1. The crash occurred in a wooded area adjacent to a small horse farm owned by the parents of Jennifer Carbarle. (J.A. at 1781- 1785). Ms. Carbarle, an eyewitness to the crash, testified that she was riding a horse in the pasture when the aircraft twice passed at low altitude, and on the second pass "buzzed" at the height of their garage — so low that she could have reached up and touched the plane with a broom stick. (J.A. at 1785-1786, 1808).

The statement of a second witness from the NTSB report had the aircraft flying at low altitude above the trees for some time before crashing. (J.A. at 1894-1897). Regulations of Federal Aviation Administration mandated that any flight in this type of location (*i.e.*, not an approved airport or landing site) must always be at least five hundred (500) feet above any person or building. (J.A. at 1833-1836); F.A.R. 91.119. Hortman Aviation also promulgated flight training rules to prohibit any flight training activity below one thousand (1000) feet. (J.A. at 1865).

2. Specifically, these motions were as follows:

1. Motion to preclude evidence of or reference to other accidents absent a foundational showing by plaintiffs of "substantial similarity" to the accident at issue (J.A. at 68-87);

2. Motion to preclude evidence of other accidents statistics absent a proper foundational showing by plaintiffs of the source and reliability of the data and requisite proof of "substantial similarity" to the present case (J.A. at 56-62); and

3. Motion to preclude evidence of certain FAA correspondence and FAA re-evaluation (J.A. at 96-105).

to "blanket prohibitions" that precluded them from making or having the opportunity to make a foundational showing, by trustworthy evidence, of substantial similarity to the accident at issue. Nothing is farther from the truth.

On the contrary, the record confirms that the district court repeatedly addressed these evidentiary issues and the threshold showing required for use of or reference to other accidents, either for direct examination through plaintiff's expert, Michael Antoniou, or cross-examination of defense witnesses. (J.A. at 981- 982, 1278, 1293, 1296-1297). Despite repeated opportunities, petitioners never made the required foundational showing, nor did they request an *in camera* hearing to establish substantial similarity of the other accidents, either through firsthand witnesses or accident investigative reports setting forth the specifics of the other accidents.

The district court also conducted a lengthy hearing outside the presence of the jury on the admissibility of a summary list contained in Grumman files that referenced other accidents, with petitioners' counsel conducting cross-examination of Gulfstream's Associate General Counsel. (J.A. at 1336-1349). It also read, *in camera,* a 111 page deposition transcript of former FAA Project Chief Charles Arnold regarding the admissibility of certain documents. (J.A. at 1012-1014).

Since petitioners never made the required foundational showing, despite numerous opportunities to do so, the district court properly excluded evidence of other accidents. As the district court noted in its Memorandum Opinion:

> Plaintiffs, however, did not request such a hearing. It is not the province of this Court to advise the parties as to how to present evidence. Furthermore, the court did in fact give plaintiffs the opportunity to argue the admissibility of other accidents and to present evidence on the question. . . . (J.A. at 267).

After the district court also denied petitioners' post-trial motions, petitioners appealed to the United States Court of

Appeals for the Third Circuit. After full briefing and oral argument on the issue petitioners now ask this court to review, the Third Circuit unanimously affirmed the judgment. Petitioners then moved for rehearing, which was denied since no judge on the panel requested rehearing and a majority of the circuit judges did not vote for rehearing *en banc. See,* Appendix, p. 1a; Fed. R. App. P. 35.

Petitioners now request that this court grant certiorari to review these same discretionary evidentiary rulings. For the most part, petitioners merely repeat the same arguments that were rejected by the district court and the Third Circuit. In so doing, petitioners have not raised an important issue of law, demonstrated a split of authority among the United States courts of appeals, or suggested any other special and important reason for this Court to grant review. Accordingly, the petition should be denied.

SUMMARY OF THE ARGUMENT

This case involves routine evidentiary issues and does not implicate any reason to warrant discretionary review by this Court. There is no conflict among the courts of appeals as to the standard for admitting the evidence in question, nor does the judgment conflict with Pennsylvania law. Indeed the trial court applied the proper standard requiring a threshold determination of substantial similarity.

In applying this standard, the trial court found that petitioners did not avail themselves of the opportunity to prove that other accidents were substantially similar and constituted otherwise reliable evidence, and therefore properly excluded the evidence. The Third Circuit Court of Appeals thereafter properly reviewed petitioners' appeal and correctly ruled that it was without merit. The judgment in favor of respondents should be upheld without further review.

ARGUMENT

I. PETITIONERS HAVE FAILED TO SET FORTH GROUNDS SUFFICIENT TO JUSTIFY THIS COURT'S REVIEW OF DISCRETIONARY EVIDENTIARY RULINGS

Petitioners claim that review is warranted under Rule 10.1(a) on three grounds: (1) that the Third Circuit ruling conflicts with decisions of other circuits; (2) that the judgment conflicts with Pennsylvania Law; and (3) that the Third Circuit made an extreme departure from the accepted and usual course of judicial proceedings by supposedly "rubber-stamping" the judgment of the district court. None of these arguments has merit.

First, the record amply documents the district court's thoughtful review of evidentiary issues and proper exercise of its gatekeeper function in applying the rules of evidence, which required petitioners to make certain foundational showings prior to use of other accidents evidence or documents. Second, there is no genuine dispute as to the threshold inquiry: a showing of substantial similarity and compliance with other evidentiary proof such as factual foundation, relevance, and authentication for use of other accidents. *See, e.g., Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3d Cir. 1988). Petitioners simply failed to make the required threshold showing, and there is no need for this Court to review the discretionary evidentiary rulings, which have already been reviewed — and affirmed — by the Third Circuit. Far from raising an important question of law, this case merely presents a routine evidentiary issue that the district court resolved by exercising its discretion in accordance with well established law.

A. *Rule 10.1 Permits Review Only For Those Cases Demonstrating Special and Important Circumstances, Factors Not Present In This Case*

Supreme Court Rule 10.1 sets forth the considerations governing review by this Court on a writ of certiorari and pro-

vides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only where there are special and important reasons therefor." Subpart (a) provides criteria for determining whether to grant review based upon (1) conflict with rulings of other circuits on the same issue, (2) conflict with applicable state court of last resort or (3) extreme departure from accepted and usual course of judicial proceedings. Petitioners have not met any of these criteria.[3] On the contrary, this case merely involves the application of well-settled Pennsylvania products liability law and the Federal Rules of Evidence to the type of routine evidentiary rulings that are made by district court judges every day.[4] Accordingly, review by this Court is neither warranted nor justified.

1. *The Judgment In This Case Does Not Conflict With Rulings Of Other Circuits*

It is well-settled in the Third Circuit that evidence of other accidents cannot be admitted unless the party seeking to introduce such evidence makes a threshold showing of substantial similarity between the evidence sought to be admitted and the accident at issue in the underlying case. *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 92 (3d Cir. 1983)

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3. In earlier decisions this Court has cautioned:

> . . . that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) (emphasis supplied).

4. As members of this Court have stated previously, and in language equally applicable here:

> the only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Powell v. Nevada, ___ U.S. ___, 114 S. Ct. 1280, 1284-85 (1994) (J. Thomas, dissenting) (*quoting Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182, 189 (1973) (J. Stewart, dissenting)).

(*accord Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988), holding that evidence of other accidents and accident statistics is not admissible, either directly or indirectly, unless the proponent of the evidence first satisfies the prerequisite foundational showing of "substantial similarity" to the accident at issue). *See also, Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992) and *Walker v. Messerschmitt Bolkow Blohm GmBH and MBB Helicopter Corp.*, 848 F.2d 496 (5th Cir. 1988). In the present case, all the district court did was apply these well settled legal principles to the facts of this particular dispute.

2. *Nor Does The Judgment Conflict With Pennsylvania Law*

Pennsylvania state court cases likewise require a showing of substantial similarity before admitting evidence of other accidents and this is true regardless of whether the evidence is being admitted to establish notice or the existence of a defect. *See, e.g., Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334, 348 (1988); and *Whitman v. Riddell,* 324 Pa. Super. 177, 471 A.2d 521 (1984), where the courts required that the proponent of the evidence establish a foundation showing that it is substantially similar in addition to establishing that it (1) is logically related to the theory of a contested issue in the case, (2) is relevant, and (3) will not prejudice or confuse the jury.

Thus, it is clear that Pennsylvania law requires a threshold showing of substantial similarity. This is the showing which petitioners failed to make, despite numerous opportunities, and the exclusion of this "evidence" concerning other accidents was proper under both Pennsylvania state and federal court precedent. Accordingly, petitioners have not demonstrated that the judgment in this case conflicts with any decision of the Pennsylvania Supreme Court, the applicable state court of last resort. The district court merely exercised its broad discretion within the scope of these settled legal principles.

B. *Petitioners' Claim That The Court Of Appeals Acted Improperly Is Wholly Without Merit*

Petitioners next maintain that this Court should review the Third Circuit's decision because that Court undertook "no appellate scrutiny whatsoever" and "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (*See,* Petition, pp. 9, 13-14). *See also,* p. 14 (". . . appellate court simply disposing of another diversity case to clear its docket.").

These meritless accusations merely underscore the absence of any meritorious basis for Supreme Court review. The appellate issues were fully briefed to a panel of the Third Circuit, which granted and conducted oral argument. The Third Circuit panel affirmed the judgment of the district court. *See,* Appendix, p. 2a. Petition for rehearing was denied by Order of January 9, 1995. *See,* Appendix, p. 1a. Contrary to petitioners' unfounded contentions, the Third Circuit accorded this case proper and due consideration on appeal; and there is no justification for further review. Otherwise, as a practical matter, this court would need to grant review in virtually every case that was resolved by a judgment order in the court of appeals.

On the merits, moreover, the Third Circuit correctly determined that the district court did not abuse its discretion in making the evidentiary rulings in question. For the reasons briefly discussed below, those rulings were proper and fully consistent with Pennsylvania law, the law in other courts of appeals, and the Federal Rules of Evidence.

C. *The Court Of Appeals Properly Affirmed The Discretionary Evidentiary Rulings Of The District Court*

Petitioners claim that the trial court acted improperly is equally without merit. The district court applied the correct substantial similarity standard and acted within its sound discretion as gatekeeper to require proper foundation before use of evidence of other accidents.

1. *The Requirement of "Substantial Similarity"*

Evidence of other accidents or accident statistics is not admissible, either directly or indirectly, unless the proponent first satisfies the prerequisite foundational showing of "substantial similarity" to the accident at issue. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988); *Whitman v. Riddell*, 324 Pa. Super. 177, 471 A.2d 521 (1984). Significantly, while petitioners try to create a conflict between the circuits or between federal and Pennsylvania state law in this regard, there is no conflict on the basic legal issue: that upon a threshold showing of substantial similarity to the accident at issue, evidence of other accidents or statistics *may* be admissible, provided that the other evidentiary considerations such as authenticity, relevance and hearsay exceptions are satisfied.

Moreover, the issue before the court of appeals was not whether the district court used the correct standard — substantial similarity — but whether the district court abused its discretion in finding that petitioners failed to satisfy that standard. In this regard, it is well settled that the admission or exclusion of evidence is a matter within the sound discretion of the trial court and that evidentiary rulings are reviewed under the abuse of discretion standard. *In re: Merritt Logan, Inc.*, 901 F.2d 349, 359 (3d Cir. 1990). *See also, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ____ U.S. ____, 113 S. Ct. 2786, 2794 (1993) (re-emphasizes trial court's gatekeeper function).

Courts interpreting Pennsylvania law have repeatedly ruled that even with a foundational showing of substantial similarity, evidence of other accidents should be precluded unless such evidence (1) is logically related to the theory of a contested issue in the case, (2) is relevant, and (3) will not prejudice or confuse the jury. *See, Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 34, 348 (1988); *Whitman v. Riddell*, 324 Pa. Super. 177, 471 A.2d 521 (1984); *Uitts v. General Motors Corp.*, 411 F. Supp. 521 (E.D. Pa. 1974) *aff'd without opinion*, 513 F.2d 626 (3d Cir. 1975). The well established threshold for admissibility of other accidents evidence requires a showing of "similar accidents occurring ... under the same or similar circumstances." *Whitman v. Riddell*,

supra, 471 A.2d 523. *See also, Majdic v. Cincinnati Machine Co.,* 537 A.2d at 340-341.[5]

2. *Petitioners Repeatedly Failed To Meet The Substantial Similarity Requirement*

Despite numerous opportunities to do so, Petitioners never established of record that any of the "other accidents" in question were substantially similar to the accident in the present case. (J.A. at 266-268). Petitioners assert that they failed to establish substantial similarity because they were not permitted to do so. *See,* Petition, p. 13. Not so. As the district court recites in its Memorandum Opinion, the record reflects numerous instances where the court revisited the "other accidents" issue and made it very clear that it would not admit evidence of other accidents *unless petitioners first provided proof that those other accidents were substantially similar to the accident in the present case.* (J.A. at 752-753, 981-982, 1278, 1293, 1296-1297).

As the trial proceeded, this same issue arose on several occasions. Each time, plaintiffs' counsel argued the legal standards for admissibility and his personal conclusion that these other accidents were substantially similar. Each time, the district court noted that it did not, as of that time, have any evidence of substantial similarity:

> The Court: Well, you may have to call him back. I don't know what, *but I don't have anything, any evidence at this point that they are substantially similar* and we are not going to try fifteen other accident cases here that will unduly prolong the trial. So I will sustain the objection.

(J.A. at 982) (emphasis added). Throughout, the court conveyed to counsel the need for threshold proof of substantial similarity by competent evidence. (J.A. at 1278, 1293, 1296-97).

Despite these admonitions, petitioners never introduced evidence sufficient to establish substantial similarity and never

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5. Accordingly, Petitioners claim of an *Erie* issue is unfounded. *See,* Petition, p. 9.

made an appropriate offer of proof.[6] Thus, the court exercised its gatekeeper function. Petitioners never requested an *in camera* hearing on the substantial similarity issue and never made the requisite showing. Merely because petitioners' counsel may believe other accidents to be substantially similar to the accident at issue is not enough; nor does it relieve petitioners from satisfying the requirement of presenting appropriate *evidence* to establish substantial similarity.

3. *Substantial Similarity Is The Uniform Standard For Admissibility Of Other Accidents Evidence Under The Federal Rules Of Evidence, And The Ruling Below Does Not Conflict With Other Circuits*

Petitioners are simply wrong in asserting that there is material conflict between the circuits as to the substantial similarity threshold for admissibility of other accidents evidence. A review of pertinent case law from the Fifth, Seventh, Tenth, Twelfth and D.C. Circuits demonstrates the several flaws in petitioners' reasoning. All of these circuits, like the Third Circuit, require a showing of substantial similarity for admissibility of other accidents evidence, whether for direct evidence, notice or cross-examination. *See, Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992) (substantial similarity standard applied and satisfied by actual testimony); *Walker v. Messerschmitt Bolkow Blohm GmBH and MBB Helicopter Corp.*, 848 F.2d 496 (5th Cir. 1988) (substantial similarity requirement applied and met based upon testimony from the pilot who was involved in the other accident). The fundamental distinction is that plaintiffs in *Four Corners*

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6. Likewise, petitioners never requested an *in camera* hearing to do so. While petitioners claim they were denied such, the record demonstrates that the district court permitted an *in camera* hearing when requested pertaining to documentary evidence, and permitted petitioners' counsel to call Thomas Ramee, Gulfstream's Deputy General Counsel, on cross-examination as part of that hearing. (J.A. at 1336-1349).

Likewise, the trial court reviewed *in camera* recorded testimony of Charles Arnold, an FAA official directly involved in FAA re-evaluation of Grumman aircraft, to determine admissibility of re-evaluation documents. (J.A. at 1012-1014).

and *Walker* established evidence of substantial similarity, whereas petitioners in this case did not.

Petitioners next assert that even were evidence of other accidents properly excluded in the first instance, it should have been admitted under a less stringent standard to prove notice of the alleged defect. This argument is also without merit. Proof of substantial similarity is still required, regardless of the purpose of the other accidents evidence. Again, there is no conflict among the courts of appeal on this point. *See, Jackson v. Firestone Tire and Rubber Co.,* 788 F.2d 1070 (5th Cir. 1986) (addressed the substantial similarity requirement for notice issues). *See also, Gumbs v. International Harvester, Inc.,* 718 F.2d 88, 97-98 (3d Cir. 1983) (evidence of prior accidents to prove notice of danger, existence of danger or cause of the accident requires showing of substantial similarity); *John McShain, Inc. v. Cessna Aircraft Corp.,* 563 F.2d 632 (3d Cir. 1977) (upheld district court refusal to admit thirty accident reports submitted by the NTSB as inadmissible hearsay); *Nachtsheim v. Beech Aircraft Corp.,* 847 F.2d 1261 (7th Cir. 1988) (upheld the trial court's exclusion of hearsay data offered through plaintiffs' expert in a case involving an airplane crash, since the other accident did not occur under conditions "substantially similar" to the accident at issue).

Having failed to meet the threshold to introduce evidence of other accidents during their case in chief or through their experts, petitioners next sought to introduce this same evidence through cross-examination of defense witnesses. Rulings with respect to the scope of cross-examination are within the sound discretion of the trial court. *United States v. Apfelbaum,* 621 F.2d 62, 65 (3d Cir. 1980); *United States v. Werme,* 939 F.2d 108 (3d Cir. 1991). The trial court's discretion in determining the scope and extent of cross-examination includes considerations of whether the matter is collateral, whether testimony is likely to confuse or mislead the jury and whether testimony would simply waste time. *See, Commonwealth v. Dunkle,* 385 Pa. Super. 317, 561 A.2d 5 (1989). Moreover, if contradictory evidence is not competent to be introduced as substantive evidence, it also cannot be used for purposes of impeachment. *Commonwealth v. Baez,* 494 Pa.

380, 431 A.2d 909 (1981); *McGoldrick v. Pennsylvania Railroad Co.*, 430 Pa. 597, 241 A.2d 90 (1968).

Finally, petitioners contend that the defense opened the door to permit testimony of other accidents evidence absent a showing of substantial similarity. Again, this is misplaced. The trial court should not be second guessed in its rulings on scope of cross-examination. (J.A. at 1012-1013). For all these reasons, and despite repeated attempts by petitioners' counsel, the district court did not abuse its discretion in excluding the evidence at issue in this petition.

CONCLUSION

This petition does not raise an important question of law, nor any question of federal law on which the courts of appeals are in conflict. It merely presents a routine evidentiary ruling that the district court made in its discretion in accordance with well settled law. For all these reasons, respondents Grumman American Aviation Corporation and Gulfstream Aerospace Corporation respectfully urge this Court to deny this petition.

Respectfully submitted,

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